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February 9, 2021

**VIA ELECTRONIC FILING**
The Honorable Jocelyn G. Boyd
Chief Clerk/Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

**Re: Public Service Commission Review of South Carolina Code of Regulations Chapter 103 Pursuant to S.C. Code Ann. Section 1-23-120(J)**
**Docket Number: 2020-247-A**

Dear Ms. Boyd:

Pursuant to the Notice of Review filed in the above-referenced docket, Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP" or together, the "Companies") respectfully submit the following comments on Article 8 of the Commission's regulations. The Companies appreciate the opportunity to provide input in this process and will participate in the workshop scheduled for February 19, 2021. The Companies believe that as cases have become more technically complex and heavily litigated, it is worth evaluating whether changes to the Commission's regulations could provide more predictability and efficiency in Commission proceedings while ensuring due process for all involved. The Companies believe that the types of changes outlined below could reduce ambiguity in the regulations and promote consistency in practice before the Commission.

**103-817(C)(2) - Proceedings**

In many cases, whether an application is for a minor adjustment to a program or an uncontested case, a hearing may not be necessary for the Commission to rule on the matter and may not be requested by the participating parties. The proposed edits are intended to reflect the Commission's statutory authority to make a decision without a hearing. To that end, the Companies propose the following edits to 103-817(C)(2):

> The Chief Clerk after filing of the pleadings shall give the Commission notice of such filing at the next regular meeting of the Commission. ~~Where provided by law, a~~ Any proceeding initiated under these rules may be ruled upon by the Commission ~~disposed of~~ without hearing ~~by Order of the Commission within 14 days after the pleading has been accepted for filing,~~ upon the ~~written~~ opinion of the Commission that the matters filed ~~pleading on its face~~ show~~s~~ that a hearing is not necessary, in the public interest, or not required for the protection of substantial rights.

**103-817(C)(3)(a) – Service upon the Consumer Advocate**

Act No. 258 of 2018 amended S.C. Code Ann. § 37-6-604 and requires that the Consumer Advocate "be provided notice of any matter filed at the Public Service Commission that could impact consumers' utility rates . . . ." S.C. Code Ann. § 37-6-604(C). The Act did not specify who would be responsible for providing such notice. While it appears that the Clerk's Office has taken up this role, for the sake of clarity, it would be helpful to memorialize this within the regulations, and the Companies propose the Commission do so at S.C. Code Ann. Regs. 103-817(C)(3)(a):

> (a) Serve the pleadings, as required, in accordance with R.103–830, or within fourteen (14) days, provide the party filing the pleading a Notice of Filing, and, where required by law, the party at its own expense shall publish such notice one time in newspapers having general circulation in the State, or, if applicable, in newspapers having general circulation in the party's service area. Except for good cause shown, proof of publication must be filed on or before the return date. The Chief Clerk, pursuant to other rules of the Commission, may require that the Notice of Filing be mailed to customers and other persons and a certificate of mailing be filed on or before the return date. The Chief Clerk shall cause notice to be provided to the Consumer Advocate in accordance with S.C. Code Ann. § 37-6-604(C).

**103-817(C)(3)(b) – Proceedings**

In customer complaint dockets—both those involving sophisticated commercial parties and those involving residential customers—the Commission's practice has been to immediately set testimony filing deadlines and a hearing date, while the utility will often either file a motion to dismiss or seek to work out a schedule with the Complainant to present to the Commission for filing testimony and holding a hearing. The revisions proposed below create time to accommodate those procedural steps. Additionally, the procedural schedule often requires the utility to file testimony before or at the same time the Answer is due, pursuant to S.C. Code Ann. Regs. 103-830. For complaints that are not subject to a motion to dismiss, this process results in the utility having little or no opportunity to conduct discovery or otherwise be given an opportunity to understand the background and nature of the issues referenced in the complaint, which is often missing critical details, before filing its testimony. Defendants in a complaint proceeding must be afforded time to fully investigate the allegations of the complaint, conduct discovery as needed, and prepare a

defense before pre-filing testimony as to the merits of the complaint. *See, e.g., Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 107, 708 S.E.2d 755, 761 (2011) ("[T]he PSC was obligated to accord Utility a meaningful opportunity to rebut the evidence presented …."). Pre-filing testimony is a unique requirement in practice, and parties must be given an adequate opportunity to understand the matters at issue prior to addressing them in pre-filed testimony. Moreover, as discussed in detail below in reference to S.C. Code Ann. Regs. 103-842, the party with the burden of proof—the Complainant in complaint proceedings—must file testimony first in order to define the matters at issue in the proceeding, which are often only very briefly discussed in the complaint. For these reasons, the Companies propose that the Commission consider the following type of changes to S.C. Code Ann. Regs. 103-817(C)(3)(b):

> Fix a date for hearing, as soon as practicable~~, and when a date is available on the docket calendar~~. If the hearing date has not been included in the Notice of Filing, the Chief Clerk shall prepare a Notice of Hearing, and shall forward such Notice of Hearing to all parties. Proof of mailing must be placed in the formal record. In customer complaint dockets, the Clerk's office shall give parties an opportunity to develop a mutually agreeable schedule and/or file any preliminary motions to aid in the overall efficiency of the matter prior to the filing of testimony. The Clerk's office may issue notice of a hearing and testimony filing deadlines no earlier than 30 days following service of the complaint pursuant to S.C. Code Ann. Regs. 103-830(A)(2). In no case will the defendant be required to pre-file testimony prior to filing its answer.

After the Commission rules on any preliminary motions filed by the parties, including petitions for rehearing or reconsideration, the parties and the Clerk's office would ideally work together to develop a mutually agreeable procedural schedule, perhaps under the guidance of a hearing officer designated to work through such procedural details. The Companies also propose adding requirements for Complainant's pre-filed testimony to S.C. Code Ann. Regs. 103-845(C), which could be especially helpful for individual customers.[1] Such requirements could include requiring a summary of the statute or regulation under the Commission's jurisdiction which is purported to be violated or at least with enough specificity that the statute or regulation implicated would be easily identifiable.[2] This would make sense as it is not an infrequent occurrence for Complainants to raise issues that are not within the Commission's jurisdiction and thus not appropriate for a Commission proceeding. Such requirements could also include the results of any

[1] See S.C. Code Ann. § 58-3-140(D) ("The commission must promulgate regulations to require the direct testimony of witnesses appearing on behalf of utilities and of witnesses appearing on behalf of persons having formal intervenor status, such testimony to be reduced to writing and prefiled with the commission in advance of any hearing.").

[2] Pursuant to S.C. Code Ann. § 58-27-1940, "Any person, corporation, or municipality having an interest in the subject matter, including an electrical utility concerned, may petition in writing setting forth any act or thing done or omitted to be done by any electrical utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer or of any order or rule of the commission."

investigation conducted by the Office of Regulatory Staff, and describe particular information that may be of use in a billing dispute or a service issue. Such guidance in a regulation may aid the Commission in assessing a complaint and facilitate a process which is more efficient and navigable for customers, the Commission and the responding utilities. Such a provision would also promote administrative efficiency by ensuring that Complainants are on notice of the legal requirements for establishing a complaint subject to the Commission's jurisdiction while also ensuring that utilities are on notice of the specific violation alleged.

**103-829 – Motions**

This rule provides that motions, except those made during hearings, should generally be reduced to writing and filed at least 10 days prior to a hearing. If a regulation defaults to requiring motions 10 days before hearing, as S.C. Code Ann. Regs. 103-829 does, it makes sense that the filings (such as testimony or discovery) upon which a motion would be predicated are made by such time.[3] This is also important when considering S.C. Code Ann. Regs. 103-833, which provides the default that no discovery should be issued more than 10 days prior to the start of a hearing.

Rules like S.C. Code Ann. Regs. 103-829 and 103-833 lose their meaning when procedural schedules allow for testimony, such as surrebuttal testimony, to be filed too close to the start of the hearing. If there is insufficient time between the filing of surrebuttal testimony and the hearing, parties effectively lose their ability to file motions or propound discovery on surrebuttal testimony. Moreover, the parties lack meaningful access to the testimony in order to prepare to answer Commission questions or conduct cross examination,[4] and presumably the Commission would want all relevant filings in advance of a hearing in order to prepare their own questions. The Companies believe the timing safeguards already included in the Commission's rules should play a bigger role in influencing the procedural schedules set by the Commission.

[3] S.C. Code Ann. § 58-3-140(D) states that "[t]he commission must promulgate regulations to require the direct testimony of witnesses appearing on behalf of utilities and of witnesses appearing on behalf of persons having formal intervenor status, such testimony to be reduced to writing and prefiled with the commission in advance of any hearing."

[4] Permitting testimony to be pre-filed just days prior to the hearing is not compliant with S.C. Code Ann. § 58-3-140(D) and is inconsistent with the very purpose of pre-filing testimony. As the Commission has previously found, the purpose of pre-filing testimony is to provide notice of the issues, accord fairness to all parties, and allow for a more orderly and efficient hearing. Order No. 1996-259-WS at 2, Docket No. 1996-629 (Sept. 10, 1996); see also S.C. Code Ann. Regs. 103-802 ("[The Commission's regulations concerning Practice and Procedure] are intended to insure that all parties participating in proceedings before the Commission will be accorded the procedural fairness to which they are entitled by law.").

**103-830(A) and (B) – Filing and Service of Pleadings**

This rule is not explicit that the 30-day time period for filing answers begins upon service of the Clerk's notice rather than actual receipt of the complaint. Read strictly, the existing version of the rule would start the 30-day clock when the utility received the complaint, which in most cases is prior to being formally served by the Clerk's office. The Companies propose the following edits to S.C. Code Ann. Regs. 103-830, which make clear that the 30-day clock begins upon service by the Clerk's office:

A. Service of Complaints and Answers

(1) A complainant requesting a hearing shall file the complaint with the Chief Clerk. The Chief Clerk shall mail a copy of the complaint to the defendant within 14 days of filing.

(2) The defendant shall serve its answer on the complainant and shall file its answer with certification of service with the Commission within 30 days of receipt of the complaint as served under subsection (A)(1) of this rule, unless an extension of time is granted for good cause shown. Any defendant failing to file its answer within such period, unless an extension of time is granted, shall be deemed in default and all relevant facts stated in such complaint may be deemed admitted."

B. Service of Petitions and Answers

(1) If a person other than the petitioner is named in a petition for a declaratory order or in a petition for a rule to show cause, the Chief Clerk shall cause a copy of the petition to be mailed to such named person within 14 days of the filing of the petition.

(2) The person named in a petition for a declaratory order or in a petition for a rule to show cause shall serve its answer on the petitioner and shall file its answer with certification of service with the Chief Clerk within 30 days of the receipt of the petition from the Chief Clerk as served under subsection (B)(1) of this rule unless an extension of time is granted for good cause shown.

**103-830.1 – Service Between Parties of Record**

For those who regularly practice before the Commission, service of filings through email or electronic service is the default. The Companies propose the following edits to align the rule with current practice for service between parties of record:

- ~~Upon written agreement by all the parties in a docket, s~~Service of filings made in a docket at the commission may be made through e-mail or electronic service, unless affirmatively declined in writing by a party. ~~The written agreement memorializing the parties' consents shall be filed with the commission in the appropriate docket.~~

**103-833 – Written Interrogatories and Request for Production of Documents and Things**

As currently drafted, S.C. Code Ann. Regs. 103-833 allows the party propounding discovery to set the deadline for responses, so long as it is not less than 20 days after service of the discovery. The Companies see no value in allowing the discovery proponent to set the deadline for responses when the rule provides the recipient a minimum of 20 days to serve answers and objections. The Companies recommend revising this regulation so that discovery responses are due within 20 days, unless the time is extended by the Commission for good cause shown or parties otherwise agree among themselves:

> (B): "The person upon whom the interrogatories have been served shall serve a copy of the answers and objections within ~~the time period designated by the party of record submitting the interrogatories, but not less than~~ 20 days after the service thereof, unless the time is extended by the Commission for good cause shown or agreed to by the party propounding the interrogatories."
>
> (C): "The person upon whom the requests for production of documents and things have been served shall serve a copy of the answers and objections within ~~the time period designated by the party of record submitting the requests for production of documents and things, but not less than~~ 20 days after the service thereof, unless the time is extended by the Commission for good cause shown or agreed to by the party propounding the requests for production."

Moreover, the Companies believe that more formality in timelines for discovery could aid in the efficiency of cases. For example, procedural schedules should include a designated date after which discovery may not be propounded, as is commonly the case in other litigated matters. The notion being that discovery on direct, discovery on rebuttal, and discovery on surrebuttal should all be time bound. It does make sense that the discovery windows should/would narrow as the scope of testimony narrows. For example, in the Companies' most recent rate cases in North Carolina, the Commission's orders setting the procedural schedule required that formal discovery requests relating to the application and the Companies' pre-filed direct testimony should be served no later than 14 calendar days prior to the filing of other parties' testimony and that formal discovery requests related to pre-filed rebuttal testimony should be served no later than two calendar days after the filing of such testimony. Importantly, the procedural order limited discovery on rebuttal testimony to new material introduced in the rebuttal testimony and noted that such requests would be "carefully scrutinized upon objection that such discovery should have been sought during the initial period of discovery." The orders also provided that a party should "not be granted an extension of time to pursue discovery due to that party's late intervention or other delay in initiating discovery."[5] The Companies believe that establishing time frames for discovery

[5] *See* Order Scheduling Investigation and Hearings, Establishing Intervention and Testimony Due Dates and Discovery Guidelines, and Requiring Public Notice, Docket No. E-2, Sub 1219 (NCUC Dec. 6, 2019);

will encourage parties to propound discovery that is proportional to the needs of the matter; ensure that parties are aware of the contested issues well in advance of the hearing; allow sufficient time for settlement discussions; and, in accordance with the principles of due process, ensure the parties have the opportunity to review discovery responses and testimony and prepare for the evidentiary hearing. The Companies also believe it will minimize the amount of discovery disputes before the Commission. The Companies also note discovery cut offs were recently brought to the Commission by the Office of Regulatory Staff and another utility in another docket, and believe this is a good practice and may be a productive rulemaking, or, at a minimum, a productive practice.[6]

**103-836 – How Hearings Are Set**

This rule provides that the Commission "will assign a time and place for hearing and shall give notice thereof as required by law." Once the Commission sets a hearing and posts a notice to DMS, the notice must go through a proofing process and be included with all other bill inserts, which the Companies must provide to the printer by the 6th of each month in order to be shipped to New Jersey, where they are inserted into the bill envelopes. From there, it takes a thirty-day cycle to send bills to customers in daily batches as customers are on different billing cycles.

Given the amount of time necessary for proofing, printing, and distributing bill inserts to customers, the Companies believe that holding a scheduling conference prior to setting a procedural schedule would be beneficial to both the utilities and the Commission and facilitate more efficient and cost-effective notice to customers. This is a natural step as the more bill inserts and notices are utilized as the number of proceedings before the Commission has grown. The Companies also believe this process could potentially result in alternative means of providing customers notice which could be more effective and less costly.

**103-842 - Order of Procedure**

Generally, the party with the burden of proof—an applicant, complainant, or petitioner—is required to file testimony first, and other parties file their direct testimony after the proponent. S.C. Code Ann. Regs. 103-842(C) provides that evidence would normally be received from the Applicant, Petitioner, or Complainant first, followed by the Respondent or other parties. In some complaint proceedings involving the Companies, the Clerk's office has set a procedural schedule wherein the utility files testimony before the complainant. The Companies believe that requiring the party upon whom the burden of proof lies—in complaint proceedings, the complainant—to file testimony first is in accord with principles of procedural fairness. *See* No. 1996-259-WS at 2,

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Order Establishing General Rate Case, Suspending Rates, Scheduling Hearings, and Requiring Public Notice. Docket No. E-7, Sub 1214 (NCUC Oct. 29, 2019).

[6] *See* Joint Comments of DESC and ORS, Docket No. 2020-125-E (June 18, 2020).

Docket No 1996-629 (Sept. 10, 1996); *see also* S.C. Code Ann. Regs. 103-802 ("[The Commission's regulations concerning Practice and Procedure] are intended to insure that all parties participating in proceedings before the Commission will be accorded the procedural fairness to which they are entitled by law."); *Ross v. Med. Univ. of South Carolina*, 317 S.C. 377, 381, 453 S.E.2d 880, 883 (1994) ("[A] reviewing court has the duty to examine the procedural methods employed at an administrative hearing to ensure that a fair and impartial procedure was used.").

The following edits are intended to clarify that the Order of Procedure applies to both the procedure of the hearing itself, as well as the order in which testimony is pre-filed.

> A. Investigations. Upon an investigation initiated by the Office of Regulatory Staff or by request of the Commission, evidence in a proceeding will ordinarily be received in the following order:
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> - (1) Office of Regulatory Staff;
> - (2) Respondent;
> - (3) Other parties.
>
> B. Applications and Petitions. Evidence will ordinarily be received upon applications and petitions in the following order, notwithstanding a party's right to a meaningful opportunity to respond to evidence to which it otherwise has not had a chance to respond, including its option to file supplemental testimony or recall witnesses as needed:
>
> - (1) Applicant or Petitioner;
> - (2) Other parties;
> - (3) Office of Regulatory Staff.
>
> C. Complaint. Evidence will ordinarily be received upon complaints in the following order:
>
> - (1) Complainants;
> - (2) Respondents;
> - (3) Other parties;
> - (4) Office of Regulatory Staff.

The Companies believe this rule may have been interpreted to grant surrebuttal as a matter of right, and the Companies assert that is not a correct reading. The Companies believe that elimination of surrebuttal testimony as a standard practice would resolve certain procedural timing issues raised earlier in these comments. Surrebuttal testimony is only appropriately permitted in cases where the party with the burden of proof raises new matter in its rebuttal testimony. While permissible under certain circumstances, surrebuttal testimony is not the norm in civil practice. Further, the South Carolina Supreme Court has recognized that the opportunity to present surrebuttal testimony and evidence is "discretionary with the Commission." *Palmetto Alliance, Inc. v. South Carolina Pub. Serv. Comm'n*, 282 S.C. 430, 439, 319 S.E.2d 695, 700. Permitting surrebuttal testimony in every case is inconsistent with the evidentiary principle that the party with

the burden of proof has the right to open and close with regard to the presentation of evidence.[7] Rather than being appropriate in all cases, surrebuttal evidence is only appropriate when new matter is injected for the first time in rebuttal. *See State v. Watson*, 353 S.C. 620, 632, 597 S.E.2d 148, 150 (Ct. App. 2003); *U.S. v. Barnette*, 211 F.3d 803, 821 (4th Cir. 2000) ("Surrebuttal evidence is admissible to respond to any new matter brought up on rebuttal."). It is therefore the case that surrebuttal testimony is only appropriately permitted in the limited instances in which the party with the burden of proof has injected new matters into its rebuttal testimony, rather than permitted on a universal basis.

Further, surrebuttal testimony gives parties an additional opportunity to introduce new evidence, without providing the party with the burden of proof an additional opportunity to conduct discovery or offer its own rebuttal evidence. This practice conflicts with South Carolina case law, which requires that utilities be given a meaningful opportunity to respond to evidence. *Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 107, 708 S.E.2d 755, 761 (2011). Additionally, the party with the burden of proof "has the right to offer reply (rebuttal) testimony to that of his adversary and the latter's witnesses . . . ." *Daniel v. Tower Trucking Co. Inc*., 205 S.C. 333, 32 S.E.2d 5, 10 (1944). Universally available surrebuttal testimony conflicts with these clearly articulated requirements.

In the event the Commission is not inclined to eliminate surrebuttal testimony or to make it discretionary, there are additional procedural challenges that most often arise in the context of the timing of pre-filed surrebuttal testimony. For example, in cases where the deadline for filing surrebuttal testimony is less than 10 days before a hearing, it is impossible to file a written motion or issue discovery in compliance with the Commission's rules. Motions are often heard at the start of an evidentiary hearing, and neither the parties nor the Commission have the time or forewarning to appropriately consider the merits of the motion being presented, and the non-moving party has almost no opportunity to prepare a response or defense.

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[7] In the other jurisdictions where the Companies operate, as a general rule, the Commissions have the authority to permit surrebuttal testimony on a case-by-case basis, but it is not available in all proceedings. *See, e.g.*, NCUC Order Adopting Final Rules at p. 6, Docket No. E-100, Sub 113 (Feb. 29, 2008) ("The utilities have the burden of proof in fuel charge adjustment cases and, for that reason, have the right, as a general rule, to present the closing evidence in rebuttal. The Commission does, however, have the discretion, on a case-by-case basis, to allow surrebuttal testimony based upon a showing of good cause.); *In the Matter of the Joint Application of SBC Communications, Inc. and AT&T Corporation for Consent and Approval of a Change of Control*, 2005 Ohio PUC LEXIS 317, *10, Case No. 05-269-TP-ACO (Ohio P.U.C., June 14, 2005) ("Although not definitively committing to the filing of intervenor surrebuttal testimony, the Commission calls attention to the fact that any intervenor may file a motion for leave to file such testimony at the appropriate time."); *Louisville Gas and Electric Co.*, Case No. 2002-00232 at p. 2 (Ky. PSC Nov. 22, 2002); Order Denying Motion to Strike, Request for Continuance of Hearing, Request to file Surrebuttal Testimony, and Request to Impose Sanctions, Order No. PSC-00-2340-PCO-TP, Docket No. 000084-TP (Florida PSC, Dec. 6, 2000) (denying request to file surrebuttal testimony).

**103-853 - Finality of Decision**

S.C. Code Ann. Regs. 103-853 provides, in part, as follows: "All proceedings before the Commission shall be disposed of by issuance of an Order as defined in R. 103-804K served upon all parties of record." In practice before the Commission, parties frequently file motions, which the Commission considers and votes on at their weekly business meetings. After the vote, the Commission issues a directive which memorializes the Commission's vote. Following issuance of a directive—if it is not a directive order—the Commission issues a formal order. After issuance of the formal order, any party to the proceedings may petition the court for rehearing or reconsideration within 10 days after service of notice of entry of the order. *See* S.C. Code Ann. §§ 58-27-2150, 58-5-330; S.C. Code Ann. Regs. 103-854. Importantly, a party cannot request reconsideration or rehearing, or ultimately pursue an appeal, until the Commission issues a final order. In order to ensure that parties can avail themselves of these options, the Companies propose amending S.C. Code Ann. Regs. 103-853 to specify that once the Commission issues a directive—and not a directive order—a formal order must follow within 30 days. This will allow the parties to avail themselves of other remedies, including appeals, if needed. Delays in issuing final orders could otherwise harm a party's appellate rights by introducing unnecessary delay into the proceedings. It is important that litigants before the Commission have an understanding of when to expect an order once a decision is made via Commission vote.

The Companies sincerely appreciate the opportunity to comment on this matter and look forward to participating in the Commission's workshop on February 19, 2021.

Sincerely,

Katie M. Brown

Katie M. Brown

cc: Parties of record